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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SERVOTECH INTERNATIONAL ESTABLISHMENT,
Petitioners

versus

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Question 1: When, in a civil forfeiture proceeding for illegal export of arms, a valid Executive Order or other Presidential designation proscribing the export control of arms must be in existence for a violation of 22 U.S.C., Section 2778, and 22 U.S.C., Section 401, to occur.

Question 2: At the time of seizure, no valid arms export regulations were in force to make an attempt to export arms illegal under 22 C.F.R. 121, 122, 123 and 127.

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ONE BOEING 707 AIRCRAFT, ETC., ET AL.,
SERVOTECH INTERNATIONAL ESTABLISHMENT,
Petitioners

versus

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Servotech International Establishment, respectfully requests that a Writ of Certiorari issue to review an Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit, which affirmed in part, reversed in part, and rendered a decision against Petitioner[1] as to attempting to export arms in violation of 22 U.S.C. 2778, 22 U.S.C. 401, and 22 C.F.R. 121, 122, 123, and 127.

1. The parties in the Court below were the United States of America versus One Boeing 707 Aircraft, Fg Fleuzeugleasing GmbH ("FG"), a West German Corporation and the owner of the aircraft, and Servotech International Establishment ("Servotech"), a Liechtenstein corporation and the owner of the weapons. Interested persons also include Mr. John Parks and Mr. Peter Towers, agents of Servotech.

THE OPINION BELOW

The Opinion of the Court of Appeals is reproduced as Appendix A to the Petition at Page ——. Both Petitioner and the United States appealed to the Court of Appeals. The Court of Appeals affirmed in part, reversed in part, and rendered the decision of the Trial Court. The Appellate Opinion is reported in 750 F.2d 1280 (1985).

JURISDICTION

The Opinion and Judgment of the Court of Appeals were entered on January 21, 1985.

Petitioner invokes the Court's Certiorari Jurisdiction under 28 U.S.C. Section 1254(1). Filing of this petition is made within sixty (60) days of the Court of Appeals Opinion and Judgment and is therefore timely under Rules 20.1 and 20.4 of this Court.

STATUTORY PROVISIONS INVOLVED

Title 22, United States Code, Section 2778, provides in relevant part as follows:

> "(a)(1) In furtherance of world peace and the security and foreign policy of the United States, the President is authorized to control the import and the export of defense articles."

Title 22, United States Code, Section 401, provides in relevant part as follows:

> "(a) Whenever an attempt is made to export or ship from or take out of the United States any arms or munitions of war or other articles in violation of law . . . Any person duly authorized for the purpose by the President, may seize and detain . . . All arms

or munitions of war . . . and aircraft seized pursuant to this subsection shall be forfeited."

Title 22, United States Code, Section 1934, provides in relevant part as follows:

"Repealed. Pub.L. 94-329, Title II, § 212(b)(1), June 30, 1976, 90 Stat. 745.

The annotations thereto provide in relevant part as follows:

"Reference to this Section Deemed Reference to Section 2778 of this Title. Section 212(b)(1) of Pub.L. 94-329 provided in part that: "Any reference to such section [this section] shall be deemed to be a reference to section 38 of the Arms Export Control Act [section 2778 of this title] and any reference to licenses issued under section 38 of the Arms Export Control Act [section 2778 of this title] shall be deemed to include a reference to licenses issued under section 414 of the Mutual Security Act of 1954 [this section]."

Saving Provisions. Section 212(b)(2) of Pub.L. 94-329 provided that: "All determinations, authorizations, regulations, orders, contract agreements, and other actions issued, undertaken, or entered into under section 414 of the Mutual Security Act of 1954 [this section] shall continue in full force and effect until modified, revoked, or superseded by appropriate authority."

Title 22, Code of Federal Regulations, Section 121, et seq., provides in relevant part as follows:

"Part 121—Arms, Ammunition, and Implements of War

Authority: Sec. 414, as amended, 68 Stat. 848; 22 U.S.C. 1934; secs. 101 and 105, E.O. 10973, 26

FR 10469; sec. 6, Departmental Delegation of Authority No. 104, 26 FR 10608, as amended, 27 FR 9925, 28 FR 7231; and Redelegation of Authority No. 104-3-A, 28 FR 7231, unless otherwise noted.

Source: Dept. Reg. 108.605, 34 FR 12029, July 17, 1969, unless otherwise noted.

Sections 121.04-121.22 redesignated by Dept. Reg. 108.733, 42 FR 16617, Mar. 29, 1977.

Enumeration of Articles

121.01 The U.S. munitions list.

Pursuant to the authority cited supra the following articles are hereby designated as arms, ammunition, and implements of war."

Title 122, Code of Federal Regulations, Section 122, et seq. provides in relevant part as follows:

"Part 122—Registration

Authority: Sec. 414, as amended, 68 Stat. 848, 22 U.S.C. 1934; secs. 101 and 105, E.O. 10973, 26 FR 10469; sec. 6. Departmental Delegation of Authority No. 104, 26 FR 10608, as amended, 27 FR 9925, 28 FR 7231; Redelegation of Authority No. 104-3-A, 28 FR 7231.

Source: Dept. Reg. 108.605, 34 FR 12031, July 17, 1969, unless otherwise noted."

Title 123, Code of Federal Regulations, Section 123, et seq., provides in relevant part as follows:

"Part 123—Licenses for Unclassified Arms, Ammunition, and Implements of War

Authority: Sec. 414, as amended, 68 Stat. 848; 22 U.S.C. 1934; secs. 101 and 105, E.O. 10973; 26 FR

10469; sec. 6 Departmental Delegation of Authority No. 104, 26 FR 10608, as amended, 27 FR 9925, 28 FR 7231; and Redelegation of Authority No. 104-3-A, 28 FR 7231.

Source: Dept. Reg. 108.605, 34 FR 12032, July 17, 1969, unless otherwise noted."

Title 127, Code of Federal Regulations, Section 127, et seq., provides in relevant part as follows:

"Part 127—Violations, Penalties and Administrative Remedies

Authority: Sec. 414, as amended, 68 Stat. 848; 22 U.S.C. 1934; 18 U.S.C. 1001; 22 U.S.C. 401; secs. 101 and 105, E.O. 10973, 26 FR 10469; sec. 6, Departmental Delegation of Authority No. 104, 26 FR 1068, as amended, 27 FR 9925, 28 FR 7231; and Redelegation of Authority No. 104-3-A, 28 FR 7231. The provisions of Part 127 regarding exports to Southern Rhodesia, issued under E.O. 11322, 32 FR 119; 59 Stat. 620, 22 U.S.C. 287c.

Source: Dept. Reg. 108.605, 34 FR 12040, July 17, 1969, unless otherwise noted.

§ 127.01 Violations in general.

(a) It is unlawful to export or attempt to export from the United States any article or technical data for which a license or approval is required by this subchapter without first obtaining the required license or written approval from the Department of State."

Title 27, Code of Federal Regulations, Section 47, et seq., provides in relevant part as follows:

"Part 47—Importation of Arms, Ammunition and Implements of War

Authority: Sec. 38, Pub. L. 94-329, 90 Stat. 744 (22 U.S.C. 2778); 44 U.S.C. 3504(h), unless otherwise noted.

Source: T.D. ATF-8, 39 FR 3251, Jan. 25, 1974, unless otherwise noted.

47.1 General.

The regulations in this part relate to that portion of section 414 of the Mutual Security Act of 1954, as amended, which is concerned with the importation of arms, ammunition and implements of war. This part contains the U.S. Munitions Import List."

Executive Order No. 10973, dated November 7, 1961 by John F. Kennedy is reproduced in relevant part as Appendix B to the Petition at Page 22a.

Executive Order No. 11432, dated October 24, 1966 by Lyndon B. Johnson is reproduced as Appendix C to the Petition at Page 25a.

Executive Order No. 11959, dated January 18, 1977 by Gerald R. Ford is reproduced in relevant part as Appendix D to the Petition at Page 27a.

Executive Order No. 12444, dated October 14, 1983 by Ronald Reagan is reproduced in relevant part as Appendix E to the Petition at Page 29a.

Executive Order No. 12451, dated December 20, 1983, by Ronald Reagan is reproduced in relevant part as Appendix F to the Petition at Page 31a.

Executive Order No. 12470, dated March 30, 1984 by Ronald Reagan is reproduced in relevant part as Appendix G to the Petition at Page 33a.

Presidential Determination No. 85-4, dated February 4, 1985 by Ronald Reagan is reproduced as Appendix H to the Petition at Page 35a.

STATEMENT OF THE CASE

The forfeiture of weapons is permitted by 22 U.S.C., Section 401 upon a showing that a violation of law under the statute or under 22 U.S.C., Section 2778 has occurred. Violations of law are determined by Presidential authority which is partially delegated to the appropriate executive branch.

Executive Orders No. 10973, 11432, 11959, 12444, 12451 and 12470 all deal with and delegate such authority, and are reproduced in the Appendix. The President can and does directly control the export of arms, as shown by Presidential Determination No. 85-4, reproduced in the Appendix.

Regulations have been promuglated by the State Department as to export and the Bureau of Alcohol, Tobacco & Firearms as to import to carry out the Presidential delegation of authority.[2]

This action was initiated by the United States upon the filing of its forfeiture action against One Boeing 707 and weapons seized on May 12, 1981 at Houston Intercontinental Airport.

The Boeing 707 was owned by Fg Fleugzeugleasing GmbH ("FG") at the time it was seized. FG is a German corporation wholly owned by a German citizen named Carl Press. FG had leased the Boeing 707 to an Austrian air charter service called Montana Austria Flugbetrieb Gesellschaft ("Montana") at the time the Boeing 707 was seized in Houston (Tr. 4, 5).[3]

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2. The relevant regulations of export of arms are found in 22 C.F.R. 121-127. Regulations of import of arms are found in 27 C.F.R. 47.

3. Montana is not a party to this action, having gone bankrupt in Austria shortly after seizure in this case, and makes no claim to the Boeing 707.

The principal business of Montana was to fly air cargo flights between New York City and Vienna, Austria. At the time the aircraft was seized, however, Montana had contracted with Servotech to fly a cargo from Houston to South Africa. Servotech's cargo was to be the only cargo aboard the Boeing 707 as it left Houston (Tr. 64, 110).

Servotech is a corporation based in Liechtenstein and is engaged in the business of buying and selling various types of commodities, including but not limited to arms and other weaponry.

In April of 1981, Servotech entered into an agreement with Balotta Trading Establishment ("Balotta"), also a Liechtenstein corporation, to purchase certain weapons (Tr. 15, 25).[4]

Balotta operated its arms brokerage business through one of its agents, Gary Howard, who was also an informant to the United States Customs Service (Tr. 15). Upon a review of the facts supplied by Howard, Customs determined that, in fact, the subject weapons could not be legally exported from the United States, thus, Customs initiated an undercover "sting" operation with the cooperation of the agents of Balotta, the informants (Tr. 105-107), such that the informants could deprive the agents of Servotech of some 1.2 Million Dollars (Tr. 51-55).

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4. The weapons ultimately purchased and subsequently seized and forfeited included 1,146 M16A1 automatic rifles, 260 pistols, and 100 M203 grenade launchers.

The number of weapons actually delivered to Servotech and the attempt to export them was hotly contested at trial. Mindful, however, of the standard of review upon *Glasser v. United States,* 365 U.S. 60 (1942), we will not belabor the Court with the evidentiary dispute on this point.

During the course of negotiations, telephone calls between Howard and Peter Towers, agent of Servotech, were tape recorded (Tr. 116, 117).

Balotta was to obtain the weapsons of Servotech's account, here in the United States, and Servotech was to then export them from the United States to a foreign destination (Tr. 15).

Balotta, through its agents, Howard and the United States Customs Service, through its agent, Don Winkler, was to provide to Servotech all legally requisite export documentation (Tr. 24, 33, 46, 110).[5]

The plan conceived by Customs was relatively simple. The agents of Balotta, the informants, paid the Customs Service out of the above-referred to 1.2 Million Dollars some $629,000.00, with which Customs obtained some of the weapons involved herein (Tr. 16-23, 114-115). Howard spent approximately $10,000 to $15,000 in buying pistols (Tr. 22). It was never the intent of Customs and/or the informants that any of the subject weapons would ever be exported. At virtually all times, the weapons which were purchased were titled in, and were under the possession and control of Customs (Tr. 21, 22, 34).

On May 7, 1981, Montana Austria, the operator of the Boeing 707, sent the Civil Aeronautics Board a telegram requesting Traffic Rights for a flight on May 12, 1981 to fly a cargo of steel fabricates to Khartoum, Sudan (Tr. 87). On May 11, 1981, a destination change to Johannesburg, South Africa was requested. Press was notified of this change in destination and immediately

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5. Customs Agent Don Winkler, posing as a freight forwarder and weapons supplier, would "grease" the export license for Servotech through Munitions Control.

instructed his representative in Vienna to make sure the flight documents and export licenses were in order (Tr. 8). On May 12, 1981, the weapons were delivered to Houston Intercontinental Airport by Customs Agents posing as truck drivers.

As they were inspecting the weapons, Peter Towers and John Parks, agents of Servotech, were arrested along with the captain of the Boeing 707. The Boeing 707 and weapons were seized at that time (Tr. 42-52). Towers and Parks later pled guilty to willfully attempting to export weapons without a license in violation of 22 U.S.C. 2778 (a) and (c) and 22 C.F.R. 127.01 (Tr. 121-123).

Civil forfeiture proceedings under 22 U.S.C. Section 401 were instituted by the United States to permit forfeiture of all arms and the aircraft seized pursuant to the violation of law under this statute, namely the attempt to illegally export arms to South Africa without a license in contravention of 22 U.S.C. Section 2778, and 22 C.F.R. 121, 122, 123 and 127.

The Trial Court found that probable cause existed for the seizure of the weapons and the aircraft and that all persons who assisted in the seizure were immune from any liability arising from the seizure. Upon trial to the Jury, the Court ruled the weapons forfeited and the aircraft returned to FG because FG had done all it reasonably could be expected to do as an aircraft lessor to prevent the illegal use of its aircraft. Both the United States and Servotech appealed.

The Appellate Court affirmed its finding against Servotech and reversed and rendered the denial of forfeiture of the aircraft as failing to meet the standard for due process exception to forfeiture established by the United

States Supreme Court in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

The Appellate Court found that the regulations embodied in 22 C.F.R., Articles 121-127 were unaffected by Executive Order 11432.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because of the importance of the exercise of Supreme Executive authority. Enforcement of administrative regulations requires uniform standards for interpreting Presidential Orders and directives. Moreover, the absence of definite standards presents a recurring problem of abuse by selective enforcement of statutes. The Court has granted certiorari in a case now pending before it involving interpretations of a Presidential Proclamation.[6]

The Petitioner's sole point is grounded on the fact that no valid Presidential Order(s) or federal regulations as to export were in effect at the time of seizure of the arms.

It would appear that the gravamen of the Government's case is Title 22, U.S.C. 2778. Nonetheless, 22 U.S.C. 2778, Section (a) merely grants Presidential authority regarding the statute and vests the Director of the United States Arms Control and Disarmament Agency with the authority to deal with the licensing contemplated by the statute. 22 U.S.C. 2778, Section (c) defines crim-

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6. In *U.S. v. Wayte*, 549 F.Supp. 1376 (D.C. Cal. 1982), reversed 710 F.2d 1385 (9th Cir. 1983), Cert. Granted 104 S.Ct. 2655, May 29, 1984, Question 1. The defendant was indicted for failure to register for the draft. His selective prosecution was based upon Presidential Proclamation No. 4771. Without it there is no basis for criminal prosecution for non-registration.

NOTE: The Opinion of the Supreme Court of March 19, 1985 was unavailable for review prior to printing this Petition.

inality (fraud) regarding licensing procedure and violation of other parts of the statute or its rules or regulations, and prescribes the penalties therefor. Thus, obviously, one cannot *violate* 22 U.S.C. 2778(a) as it is merely authoritative, not penal and because 2778(c) has nothing to do with "attempted export".

22 U.S.C. 2778 was enacted October 22, 1968, P.L. 90-629, c. 3, Sec. 38, as added June 30, 1976, P.L. 94-329, Title II, Sec. 212(a)(1), 90 Stat. 744. It was then amended or otherwise modified from time to time thereafter to give its present form.

The parentage of Title 22, Code of Federal Regulations, Parts 121, et seq. and 127, et seq., also a part of the Government's case, flows to Executive Order No. 10973, reproduced in Appendix 22a in the Petition, which originates with the now repealed Section 414 of the Mutual Security Act of 1954, 22 U.S.C. 1934, *supra*.

It is interesting to note that from October 22, 1968 to June 30, 1976, both 22 U.S.C. 1934 and 22 U.S.C. 2778 were in effect, but 22, Code of Federal Regulations, Parts 121, 122, 123 and 127 had and at all times has had as statutory authority 22 U.S.C. 1934, even though this statute has been repealed.

It can be seen that Executive Order No. 10973, the Order creating 22 C.F.R. 121, et seq. and 127, et seq. was signed by President John F. Kennedy on November 3, 1961, to be effective as of September 30, 1961. Sec. 606 of the Order recited:

> "Sec. 606. Saving provisions. Except to the extent that they may be inconsistent with this order, all determinations, authorizations, regulations, rulings,

> certificates, orders, directives, contracts, agreements, and other actions made, issued, or entered into with respect to any function affected by this order and not revoked, superseded, or otherwise made inapplicable before the date of this order, shall continue in full force and effect *until amended, modified, or terminated by appropriate authority.*" (emphasis ours)

The next Order affecting 22 C.F.R. 121, et seq., and 127, et seq. was Executive Order No. 11432, signed by President Lyndon B. Johnson on October 22, 1968, to be effective October 24, 1968. Sec. 2 of the Order reads:

> "Sec. 2. All regulations issued and presently in effect pursuant to Section 414 of the Mutual Security Act of 1954, as amended, shall, *insofar as they relate to control of the import of arms,* ammunition and implements of war, including technical data relating thereto continue in effect and be administered by the Secretary of the Treasury until revoked or superseded by him. All pending applications for import licenses not acted upon by the Secretary of State at the date of this order shall be transferred to the Secretary of the Treasury for appropriate action." (emphasis ours)

Thus, because of the explicit language of Sec. 606, E.O. 10973, the regulations promulgated pursuant to E.O. 10973 terminated when they were amended by E.O. 11432, but were renewed by that amendment to the extent of affecting *imports*. One can only wonder why President Johnson abrogated the regulations as to exports, but so abrogate he did and such is the status of 22 C.F.R. 121, et seq. and 127, et seq. at all times material to our instant case.

No regulations pertaining specifically to 22 U.S.C. 2778 were ever promulgated. The regulations (121, et

seq. and 127, et seq.) have at all times been under the aegis of 22 U.S.C. 1934 as their statutory authority. They purport to pertain to 22 U.S.C. 2778 only by virtue of the repealer of 22 U.S.C. 1934 (90 Stat. 745), the savings clause therein which reads:

> "Any references to such section (section 414 of the Mutual Security Act of 1954, 22 U.S.C., Sec. 1934 (repealed) shall be deemed to be a reference to section 38 of the Arms Export Control Act [this section] and any reference to licenses issued under section 38 of the Arms Export Control Act [this section] shall be deemed to include a reference to licenses issued under section 414 of the Mutual Security Act of 1954."

Servotech takes the position that no regulations at all pertain to 22 U.S.C. 2778 due to the fact no regulations have ever been promulgated o ordered specifically for 22 U.S.C. 2778, but have been "stretched" to cover 2778 by the savings clause of the repealer. This should not be so; the President should order regulations specifically pertaining to 2778.

Nonetheless, assuming 22 C.F.R. 121.01, et seq. and 127.01, et seq. have any viability, that viability applies only "insofar as they relate to control of the *import* of arms" etc. Thus, obviously, Servotech's agents could be guilty of absolutely no wrongdoing. Without a Munitions List regulating exports, without regulations regulating exports 22 U.S.C. 401 and 22 U.S.C. 2778 have no viability at all with regard to our case. While 22 U.S.C. 2778(b)(2) prescribed licensing regarding both imports and exports, such licensing is requisite with regard to articles designated by the President pursuant to 22 U.S.C. 2778(a) (the Munitions List). No President has so desig-

nated regarding exports subsequent to E.O. 11432 which obliterated the regulations with respect to exports.

The Government has another almost equally severe problem, that is the language "attempt to export". 22 U.S.C. 2778 is *not* an "attempt" statute. Its clear language contemplates a completed act, to-wit, an import or an export not an attempt at same. The only "attempt" language to be found is contained in 22 C.F.R. 127.01(a), or 22 U.S.C. 401 (which contemplates some illegality).

A regulation can be no broader than its authoritative statute (see *Porter v. Prudential Ins. Co. of America,* 470 F.Supp. 203 (1979), *Day v. United States,* 611 F.2d 1122 (5th Cir. 1980) thus, obviously, 127.01(a) goes beyond the statute and to that extent is invalid, if indeed it has any validity at all in light of the foregoing. The matter of an "attempt" to export where no penalty was prescribed for such "attempt" was dealt with in another "gun running" case, *United States v. Lucas,* 6 F.2d 327 (1925), and was dealt with by the court granting the defendant's Motion to Quash the Indictment, which was granted with Judge Neterer's statement (pg. 328):

> "The further objection that the indictment merely charged an attempt, and not a consummated offense, is more serious. The act provides a penalty for anyone who "export any arms or munitions of war in violation of Section 1 (or in our case Section (b) of 22 U.S.C. 2778), etc. It seems clear that this section has relation only to the consummated offense. There is no penalty for attempting to export. The "attempt" is not "itself a separate offense." and hence not within Section 1035, R.S. (Comp. St. Sec. 1701), which provides that a party charged with the commission of a crime "may be found guilty of an at-

> tempt to commit the offense so charged, provided, that such attempt be itself a separate offense."
>
> The indictment does not charge the commission of a crime, but only an attempt to commit, which is not "itself a separate offense." The Motion to Quash is granted."

The Government knows full well that no export event came close to occurring, but has alleged only an "attempt".

Thus, it is seen that 22 U.S.C. 2778(a) merely announces presidential authority. The Government has carved 2778(a) out, and linked it to 22 C.F.R. 127, et seq. to get at the "attempted export" angle. Why? Because, clearly, 22 U.S.C. 2778(b) refers only to a completed export—not an attempt. The Court will note that the Government has been careful and diligent not to cite 22 U.S.C. 2778(b). The Government has attempted to create its own statute respecting attempted exports by utilizing the presidential authority clause, 22 U.S.C. 2778(a), discarding the export statute (22 U.S.C. 2778 (b), and utilizing a regulation whose very validity Servotech challenges (22 C.F.R. 127, et seq.). Why? Because 127 is the only authority on which the Government can rely re "attempt", to get at the illegality required by 22 U.S.C. 401.

Additional attention is commended to attention respecting Section 3 of Executive Order Nos. 12444, 12451 and 12470, signed by President Reagan, on October 14, 1983, December 20, 1983 and March 30, 1984, respectively. This Court must address the hard questions of *why* each E.O. is styled "Continuation of Export Control Regulations" and recites accordingly? If there were any such regulations, why the necessity to "continue" same? Servo-

tech argues that such are belated attempts by the Executive to "undo" E.O. 11432 re "Exports". Why else the Reagan Orders? Same are a tacit admission that between E.O. 11432 and E.O. 12444, *there were no export regulations.* Servotech so urges.

The fact remains, E.O. 11432 is specific.

E.O. 11432 dealt with only one thing—E.O. 10973; amendment of E.O. 10973. Executive Order 11432 specifically stated:

> "Sec. 2. All regulations issued and presently in effect pursuant to Section 414 of the Mutual Security Act of 1954, *as amended, shall, insofar as they relate to control of the import of arms, ammunition and implements of war, including technical data relating thereto, continue in effect and be administered by the Secretary of the Treasury until revoked or superseded by him.* All pending applications for import licenses not acted upon by the Secretary of State at the date of this order shall be transferred to the Secretary of the Treasury for appropriate action." (emphasis ours)

Don't you suppose if the *export* regulations were to "continue in effect . . ." President Johnson would have said so. Again, a studied consideration of the matter leads to only one reasonable conclusion—no regulations re *exports;* thus no valid seizure all as stated in the pleadings, etc. referred to hereinabove, Servotech's Brief, etc.

22 U.S.C. 2778, in Sec. (a)(1) gives the Executive authority to control the import and export of defense articles and defense services, etc., etc. Executive Order 11432 is styled "Control of Arms Imports" and is specific in Sec. 2 as to "*All* regulations issued and presently in

effect. . . ." President Johnson did not mention just "any" regulations, etc. he mentioned "all" regulations . . ." as amended, shall, insofar as they relate to control of the import of arms . . ." etc. If President Johnson had meant that the regulations controlling exports would "continue in effect . . ." he would have said so. He did not so state, in fact he specifically stated as noted herein that "all regulations . . . insofar as they relate to control of the *import* of arms, ammunition . . . continue in effect. . . ." We think Servotech's proposition is the only reasonable interpretation of the various Executive Orders, particularly in light of President Reagan's Executive Orders, which, as stated above, are a tacit admission that for the time periods at issue in this appeal there were no regulations pertaining to the export, attempted export, etc. of arms.

Executive Order 11959 has eliminated Executive Order 11432 by amendment to Section 301 of Executive Order 10973.

There is no question of national security intimated by this Executive Order. However, reasoning such as in *Cole v. Young*, 351 U.S. 536 (1956) would show there was no immediate threat of harm to permit exercise of summary powers, of, in that case Government employee dismissal. Nevertheless, the President does direct the export of arms such as by Presidential Determination 85-4, a proper exercise of authority permitted by Congress.

This case was a case of first impression for the Fifth Circuit regarding the question presented; although not recognized as such. Considering the importance and attention drawn to Presidential Orders and Directives and in view of the need for their interpretation, it is requested that the decision below should be reviewed by this Court.

CONCLUSION

For all of the foregoing reasons, Petitioner, Servotech International Establishment, respectfully suggests that its Petition for the Writ of Certiorari should be granted.

Respectfully submitted,

LAW OFFICES OF JACK R. BAILEY

By: _____

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Counsel for Petitioner,
Servotech International
Establishment

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari has been served upon the Solicitor General, Department of Justice, Washington, D.C. 20530, and counsel for FG, Ms. Mary Lou Andrews of the firm of Ross, Banks, May, Cron & Cavin, at 20th Floor, Coastal Tower, 9 Greenway Plaza, Houston, Texas 77046, in accordance with Rule 28, Title 28 U.S.C., the same having been mailed, First Class Mail, on the _____ day of March, 1985.

_____

PETE W. WESTON

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee-Appellant,

v.

ONE BOEING 707 AIRCRAFT, etc., et al.,
Defendants-Appellees,

Servotech International Establishment,
Defendant-Appellant.

No. 83-2485.

United States Court of Appeals,
Fifth Circuit.

Jan. 21, 1985.

Arms broker appealed, and Government cross-appealed, from a judgment of the United States District Court for the Southern District of Texas, George E. Cire, J., granting forfeiture of weapons seized during illegal attempt to export arms to Republic of South Africa without a license, but denying forfeiture of airplane used in attempt. The Court of Appeals held that: (1) neither conduct of private citizen who informed Customs Service of contact by arms broker concerning purchase of weapons in the United States for export to Republic of South Africa, nor conduct of Government in engaging in undercover investigative activity with respect to such attempt, was so outrageous as to warrant finding that arms broker's due process rights were violated by seizure and forfeiture of weapons, but (2) once airplane lessor's suspicions that possible illegal activity was afoot in charter of his

airplane were aroused, more effective steps were required to protect airplane from illegal use and subsequent forfeiture than mere instruction of delegate to secure proper documentation.

Affirmed in part, reversed in part, and rendered.

Jack R. Bailey, Houston, Tex., for defendant-appellant.

Daniel K. Hedges, U.S. Atty., Javier Aguilar, James R. Gough, C.J. (Neil) Calnan, Asst. U.S. Attys., Houston, Tex., for U.S.

Mary Lou Andrews, Houston, Tex., for One Boeing 707, etc., et al.

Appeals from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, JOHNSON, and WILLIAMS, Circuit Judges.

PER CURIAM:

This is a civil forfeiture case in which the government, upon a showing of probable cause, seized weapons and one Boeing 707 airplane which were involved in an illegal attempt to export arms to South Africa without a license.[1] After a jury trial to determine whether the weapons and aircraft should be forfeited, the district court entered judgment granting forfeiture of the weapons to the government, but denying forfeiture of the Boeing 707, returning the airplane to its owner. The owners of

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1. The United States filed this forfeiture action pursuant to 22 U.S.C. § 401 and 22 C.F.R. § 127.06 for attempted export without the legally required licenses and registrations in contravention of 22 U.S.C. § 2778, 18 U.S.C. § 371 and 22 C.F.R. articles 121, 122, 123, and 127.

the weapons appeal forfeiture while the United States cross appeals the denial of forfeiture as to the airplane. We affirm as to forfeiture of the weapons and reverse the denial of forfeiture as to the Boeing 707.

I

In early 1981, Gary Howard, an arms broker acting as agent for Balotta Trading Establishment, a Liechtenstein corporation, was contacted by another arms broker, representing Servotech International Establishment ("Servotech"). Servotech, a Liechtenstein corporation, was engaged in buying and selling various commodities, including arms and weaponry. This phone call to Howard on behalf of Servotech was in regards to purchasing weapons in the United States for delivery to the Republic of South Africa. Concerned about the possible illegality of this proposed transaction, Howard contacted the Customs Service. As a result of Howard's phone call, Customs entered into an undercover operation, teaming one of its special agents, Dan Winkler, with Howard.

In mid-April 1981, Howard was contacted again by Servotech's representative and introduced to Peter Towers, who along with John Parks, were agents for Servotech. After numerous conversations between Towers or Parks and Howard, Servotech, through Howard, entered into an agreement with Balotta, whereby Balotta would purchase weapons for Servotech for export to South Africa.

On April 27, 1981, Towers met with Howard and undercover Customs Agent Winkler. Their conversation was tape recorded. At this meeting, Towers announced the shipping arrangements for the weapons had been finalized and that a phony end use certificate showing Sudan as the final destination for the weapons would disguise the true destination of South Africa.

Soon thereafter, Towers made two wire transfers totalling approximately $1.2 million to Balotta's account at the Republic National Bank in Dallas. Howard was to use this money to purchase the weapons ordered by Servotech. However, as part of the undercover operation, Howard transferred approximately $629,000 to Customs, and Customs purchased the weapons[2] for Servotech. Howard used an additional $10,000-15,000 to buy pistols for Servotech. Ostensibly, the remainder of the $1.2 million remained in Balotta's account.[3]

On May 12, 1981, the weapons were delivered to Houston Intercontinental Airport by Customs agents posing as truck drivers. Towers and Parks were arrested while inspecting the weapons, but before any weapons were actually loaded on the waiting Boeing 707. Towers and Parks eventually pled guilty to wilfully attempting to export weapons without a license in violation of 22 U.S.C. § 2778(a) and (b) and 22 C.F.R. 127.01.[4]

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2. The weapons purchased by Customs and subsequently seized and forfeited include 1,146 M16A1 automatic rifles, 259 pistols, and 100 M203 grenade launchers.

3. Servotech alleges that the government seduced some $1.2 million from Servotech which has never been returned. Servotech's claim is not properly brought against the United States because the money was delivered to Balotta and has never been in the government's possession, except for that portion used by Customs and Gary Howard to purchase the weapons which are the subject of this appeal. Testimony in the record reveals that any money remaining is not subject to control by the United States. Consequently, if Servotech seeks return of what remains of the $1.2 million wired to Balotta, its recourse lies against others than the United States.

4. The guilty pleas of Towers and Parks do not bind Servotech in this action. As a separate corporate entity, Servotech is not estopped by the guilty pleas of its agents from seeking to protect its property from forfeiture. The criminal admissions of Towers and Parks in no way constitute a waiver of any defenses available to Servotech.

Servotech had chartered the waiting Boeing 707 from Montana-Austria, GmbH, an Austrian based charter service. At the time the aircraft was seized, Montana-Austria had contracted with Servotech to fly a shipment from Houston to South Africa. Montana-Austria did not own the 707, but rather, leased it from Fg Flugzeugleasing GmbH ("Fg").

Fg is a West German corporation, wholly owned by Carl Press. During 1978, Fg leased the Boeing 707 to Montana-Austria. Under the lease agreement Montana-Austria was to use the 707 in routine charter flights of passengers and cargo to various parts of the world. The lease agreement contained a provision requiring Montana-Austria to abide by all national and international transport laws.[5] Fg was not involved in the daily operations of Montana-Austria, but periodically sent a representative to check on the charter service and assure proper adherence to all agreements.

On May 7, 1981, Montana-Austria sent a telegram to the Civil Aeronautics Board requesting confirmation to fly a cargo of steel fabricates to Khartoum, Sudan on May 12. A destination change to Johannesburg, South Africa was requested on May 11.[6] Press was notified of this change in destination and immediately instructed his

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5. The lease provision provided as follows:
The lessee agrees to only use the aircraft in compliance with any national and international air traffic rules and laws and not to transport goods or persons whose transportation is prohibited by national or intenrational provisions.

6. Due to international time changes there is some uncertainty as to the exact timing of this interchange. Press was in New York when he received word of Montana-Austria's requested destination change and shortly thereafter flew to West Germany. It appears, however, that the request was made less than 48 hours before the seizure occurred.

representative in Vienna to check the flight documents and export licenses to make sure they were in order. The 707 was seized in Houston on May 12.

The basis of this civil forfeiture action is 22 U.S.C. § 401 which prohibits the illegal exportation of war materials. Section 401 permits seizure of items used in connection with an attempt to export munitions illegally and permits forfeiture of all arms and vehicles seized pursuant to this statute.

[1] Civil forfeiture laws require the government make a showing of probable cause before it seizes an item used in violation of its laws. *See United States v. One 1978 Mercedes Benz, Four-Door Sedan,* 711 F.2d 1297 (5th Cir. 1983); *United States v. One 1975 Ford Pickup Truck,* 558 F.2d 755, 756 (5th Cir. 1977); *United States v. One 1973 Pontiac Grand Am,* 413 F.Supp. 163, 165 (W.D. Tex. 1976). A probable cause proceeding as to the arms and Boeing 707 was held on April 18, 1983. After a two-day hearing, the district court ruled the government had probable cause to seize the weapons and aircraft under the belief that Servotech's agents, Parks and Towers, were attempting to transport the weapons to South Africa in violation of Customs regulations.

After the court found probable cause, a jury was asked to determine the fact issues relating to forfeiture. Through special verdicts, the jury declared that (1) the weapons were the subject of an illegal export attempt; (2) Fg did not consent to or participate in the attempt; (3) Montana-Austria did consent to or participate in the illegal exportation attempt.[7]

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7. Montana-Austria is not a party to this suit; the company went into bankruptcy in Austria shortly after the seizure at issue in this case.

Fg sought a judgment in its favor arguing that the government should be denied forfeiture of the aircraft based on the jury's finding that it did not consent to or participate in the illegal export attempt. Servotech filed a Motion for Judgment Notwithstanding the Verdict. The district court entered judgment granting Fg's motion to deny forfeiture of the aircraft. Servotech's motion was not granted and the weapons were forfeited to the government.

II

We deal first with Servotech's appeal of the decision to forfeit the weapons to the United States. Servotech presents two arguments as to why forfeiture of the weapons should be denied. First, Servotech argues the government's conduct in its undercover operation was so outrageous as to make forfeiture a denial of due process. Second, Servotech argues as a matter of law its agents never attempted to export and no regulations existed to make exporting munitions illegal. These arguments are without merit.

A

Servotech argues forfeiture is unwarranted in this case due to government misconduct in the use of over zealous law enforcement techniques. Essentially, Servotech claims its due process rights were violated by the seizure and forfeiture of property (munitions and money) involved in a crime the government had such a heavy hand in committing. As Servotech states, at issue is whether law enforcement conduct fell below societal standards so that the public would regard such conduct an abuse of government power. Thus framed, we find the conduct

of the government and its citizen informer, Gary Howard, perfectly proper and well within the confines of acceptable behavior by law enforcement officers.

Servotech's due process argument borrows heavily from concepts developed in the law of criminal entrapment. Servotech's position is that regardless of whether its agents, Towers and Parks, were predisposed to commit the crime, the conduct of Customs agents was so outrageous as to violate notions of fundamental fairness. Servotech contends that such behavior could prevent a criminal conviction,[8] and therefore should deny civil forfeiture as well.

Servotech's argument is not an entrapment argument. Rather, it is the due process aspect of entrapment and entrapment-like fact situations which involve undercover operations. Such operations often find law enforcement officials intimately involved in the commission of a crime. This circuit recognized a due process defense within the context of entrapment in *United States v. Tobias,* 662 F.2d 381 (5th Cir. 1981).[9] However, *Tobias* indicated that a due process violation would be found in only

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8. Servotech structures its argument from language in *United States v. Russell,* 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973), where the Supreme Court acknowledged "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction. . . ." *Id.* at 431-32; 93 S.Ct. at 1643. This possibility was reiterated by a majority of Justices in the plurality opinion *Hampton v. United States,* 425 U.S. 484, 489, 96 S.Ct. 1646, 1649-50, 48 L.Ed.2d 113 (1976).

9. Other Fifth Circuit cases on the due process aspect of entrapment include *United States v. Garrett,* 716 F.2d 257, 275 (5th Cir. 1983); *United States v. Lane,* 693 F.2d 385, 388 (5th Cir. 1982); *United States v. Nicoll,* 664 F.2d 1308, 1314 (5th Cir. 1982); *United States v. Gray,* 626 F.2d 494 (5th Cir. 1980); *United States v. McClure,* 577 F.2d 1021 (5th Cir. 1978).

"the rarest and most outrageous circumstances." *Id.* at 387. Outrageous conduct turns upon the totality of the circumstances. *Id.* Therefore, to determine whether due process has been violated in this civil forfeiture case, we look to the totality of the circumstances and balance government involvement against the extent of participation and predisposition of Servotech's agents to commit the crime. *Id.*[10]

[2] Of prime importance in rejecting Servotech's due process argument is that Gary Howard, who supplied the tip to the Customs Service, was at all times a private citizen. He was neither a paid informant nor employed by the government. The evidence showed that Howard did not initiate contact with Servotech. Rather, he was approached by an arms broker representing Servotech in regards to obtaining arms for export to South Africa.[11] After this initial telephone call, Howard voluntarily notified the Customs Service of a potentially illegal transaction. There is no evidence that Howard was instructed by Customs to initiate further contact. Rather, Howard

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10. Although this method of analysis smacks of entrapment related legal theories, we do not mean to imply that entrapment is available as a defense to civil forfeiture. *See United States v. One 1972 Wood, 19 Foot Custom Boat,* 501 F.2d 1327, 1330 (5th Cir. 1974). Because Servotech relies on entrapment related due process theories to argue the government is barred from seizing its property, we must similarly look to an entrapment analysis as the benchmark for determining whether the government's behavior in this case violated due process. Our focus is the determination of outrageous conduct. We look to entrapment concepts solely as an analytical tool for making that determination.

11. The evidence adduced at trial established that Servotech received a purchase order from the Armaments Corporation of South Africa, Ltd. on October 30, 1980 for 1000 M16A1 rifles, 700 M203 grenade launchers, 250 M16A1 carriers and 20 commando rifles. This order was received four months before Howard was first contacted by Servotech's representative in late February or early March 1981.

was merely to tape record any conversations which he might have with Servotech or its agents and representatives. Servotech's representative arms broker contacted Howard a second time, again by telephone. This second call introduced Howard to Servotech's agents, Towers and Parks, and was the springboard from which negotiations began for the procurement of weapons which Servotech would attempt to export to South Africa. This evidence shows Servotech initiated contact and followed through without any evidence of prodding or inducement by the government or its informant.[12] Clearly, then, Towers and Parks were predisposed to commit this crime, which was avoided only through the voluntary participation of Gary Howard.

Moreover, the evidence shows Towers and Parks were more than just predisposed to commit the crime. The nature of Towers' and Parks' involvement in the scheme as "predisposed active participant[s]," *see Tobias,* 662 F.2d at 387, dramatically dilutes Servotech's claim of government misconduct. Towers and Parks planned the entire transaction and were fully committed to its execution. After receiving an arms order from the Armaments Corporation of South Africa, Ltd., Servotech initiated and completed negotiations with Howard for the arms purchases. Servotech's agents obtained a phony end use certificate for delivery to the Sudan, supplied the money and arranged air transport with Montana-Austria. Throughout this scheme, Servotech's role predominated. By procuring the arms, government agents played only a small, albeit instrumental, part in the process.

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12. *Cf. Williamson v. United States,* 311 F.2d 441, 445 (5th Cir. 1962) (Information supplied by an informer pursuant to a contingent fee arrangement whereby the informer was to provide evidence against named individuals for crimes not yet committed presented obvious "opportunities for abuse.").

[3] In reviewing the government's role, we find nothing irregular or outrageous in the fact that Customs actually purchased the weapons after Servotech wired money to Howard, who in turn transferred a portion of the money to Customs. After being alerted to Towers' and Parks' predisposition to export arms illegally, the government was entitled to test their intent to attempt this crime by putting these weapons at their disposal and to institute forfeiture proceedings upon commission of the crime. The fact that government officers or employees merely afforded the opportunity or means for the commission of the offense will not defeat the resulting criminal penalties. *United States v. Russell,* 411 U.S. 423, 435; 93 S.Ct. 1637, 1644, 36 L.Ed.2d 366 (1973); *United States v. Tobias,* 662 F.2d 381, 384 (5th Cir. 1981). We see no reason not to apply this tenet to civil forfeiture penalties as well.

4] Nor do we find fault in what Servotech claims were 'weeks of duplicity" during which government undercover agents worked with Towers and Parks to execute the illegal transport. Just as artifice and stratagem will not defeat criminal prosecution, the mere fact of deceit will not defeat forfeiture.[13]

Contrary to Servotech's assertions, we do not see how Towers and Parks were led down the "primrose path" against their will. The government may have followed

13. For examples of cases upholding the use of deception by government agents to expose criminal activity, see *United States v. Russell,* 411 U.S. 423, 435-36; 93 S.Ct. 1637, 1645, 36 L.Ed.2d 366 (1973); *Lewis v. United States,* 385 U.S. 206, 208-09, 87 S.Ct. 424, 425-27, 17 L.Ed.2d 312 (1966); *Sorrells v. United States* 287 U.S. 435, 441-42, 53 S.Ct. 210, 212, 77 L.Ed. 413 (1932); *United States v. Lane,* 693 F.2d 385, 388 (5th Cir. 1982); *United States v. Tobias,* 662 F.2d 381, 386 (5th Cir. 1981).

Towers and Parks down that path, but Towers and Parks were clearly in the lead. There was no overreaching on the part of government agents, and the degree of government involvement when considering the totality of the circumstances was not outrageous.[14] We find no government misconduct and hence no due process violations. Because our holding is based on a finding of no government misconduct, we expressly pretermit as an issue whether government misconduct, if present, would affect forfeiture.

B

In its second argument, Servotech asserts that as a matter of law no illegal attempt to export arms was ever made by Servotech's agents, Towers and Parks. There are two aspects to this argument. Servotech argues that because the alleged export attempt was not "presently imminent," it technically was not an "attempt" under the law. Servotech also argues that at the time of arrest no arms export regulations were in force to make their attempt to export illegal.

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14. Our decision is in accord with the due process related entrapment cases of this circuit. *See, e.g., United States v. Lane,* 693 F.2d 385, 387 (5th Cir. 1982) (Contingent fee payments did not violate due process when informant voluntarily approached police with interest in becoming informant and government did not target individuals for informant's efforts); *United States v. Nicoll,* 664 F.2d 1308 (5th Cir. 1982) (Although DEA agents initiated contact, defendant actively negotiated deal for cocaine); *United States v. Tobias,* 662 F.2d 381 (5th Cir. 1981) (Government conduct was not outrageous where DEA set up chemical supply company to detect illicit drug manufacture and urged defendant to manufacture amphetamines after he cancelled his order for cocaine supplies); *United States v. Gray,* 626 F.2d 494 (5th Cir. 1980) (No due process violations; although government agents not only suggested the drug smuggling scheme, but also furnished defendants with repair services, an air strip and a crew).

We find the argument that Servotech's actions did not rise to the level of a bona fide attempt without merit. Unlike the cases Servotech relies on to support its claim that as a matter of law imminence was absent in this case,[15] Towers and Parks had more than "mere intention." *See United States v. Moreno,* 182 F.2d 258, 259 (5th Cir. 1950). These weapons were not merely stored in a warehouse subject to a vague intention to unlawfully export them at a distant time in the future. *Cf. Moreno,* 182 F.2d at 259 (tires intended to be illegally exported to Mexico stored in claimant's home). Towers and Parks took specific and significant steps toward fulfilling their intent. Besides ordering the weapons and securing air transportation and phony documents, Towers and Parks arrived at the airport on the scheduled day of departure and were inspecting the weapons immediately prior to loading the airplane.

[5, 6] Thus, they acted beyond mere preparation, in such a way that all steps had been taken towards commission of the crime itself.[16] That the weapons were at

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15. Much of Servotech's argument hinges on cases which focus on outmoded statutory language. *See e.g., United States v. Moreno,* 182 F.2d 258 (5th Cir. 1950); *Rimmer v. United States,* 172 F.2d 954 (5th Cir. 1949). These cases were decided prior to 1953 when the United States was entitled to forfeiture when "the property seized shall appear to have been *about to* be" unlawfully exported. 22 U.S.C. § 401 (emphasis added). However, 22 U.S.C. § 401 has been amended. The pertinent language now permits forfeiture whenever there is probable cause to believe that arms or munitions of war *"are intended to be or are being"* exported. (Emphasis added). The "about to" language upon which Servotech centers its argument for "present imminence" has been excised. Consequently, we find the authority Servotech cites unpersuasive.

16. Servotech does not complain of the court's charge to the jury on "attempt" which was as follows:

> By the term "attempt," the law means acting beyond mere preparation in such a way that all steps have been taken towards commission of the crime itself.

the airport ready to be loaded on an airplane that would depart for South Africa within hours is sufficiently imminent to qualify as an illegal attempt, regardless of whether the weapons were actually loaded on the plane or whether the plane was set in motion toward actual departure. The fact that, unbeknownst to Towers and Parks, undercover government involvement made any actual export impossible does not alter the jury's finding sufficient intent and overt acts to warrant a conclusion of attempted export. when the facts show that neither the intention to export nor the plan by which it would be carried out have been abandoned, but rather, both are actually continuing, an attempt to export illegally has been made as a matter of law. *Zarranz v. United States,* 182 F.2d 650, 652 (5th Cir. 1950).

Servotech's second argument related to the crime of attempt contends that the federal regulations on which the government based forfeiture of the weapons do not apply to attempted export. Servotech claims these regulations apply only to imports and that at the time of the seizure no law had been promulgated to proscribe attempts to export weapons.

Servotech structures its argument on a series of presidential executive orders issued to implement enforcement of arms control statutes.[17] President Eisenhower origin-

17. Section 414 of the Mutual Security Act of 1954 provided the original authority for issuance of the executive orders relied on by Servotech. This section is now codified at 22 U.S.C. § 2278 and reads in pertinent part as follows:

In furtherance of world peace and the security and foreign policy of the United States, the President is authorized to control the import and the export of defense articles and defense services and to provide foreign policy guideance to persons of the United States involved in the export and import of such articles and services. The President is authorized to designate those items which shall be considered as

ally delegated his authority under these statutes to the Secretary of State in Executive Order 10575. Executive Order 10973, signed by President Kennedy, created regulations to control international arms trafficking. These regulations, embodied in 22 C.F.R. articles 121-127 delineate the munitions list, registration and licensing requirements, and the violations, penalties, and administrative remedies for exports or attempted exports of listed munitions without a license. Servotech argues that Executive Order 11432, signed by President Johnson on October 22, 1968, abrogated these arms regulations as they pertained to export. Specifically, Servotech cites the following language from Executive Order 11432 to support its contention:

> Sec. 2. *All regulations issued and presently in effect* pursant to Section 414 of the Mutual Security Act of 1954, as amended, *shall, insofar as they relate to control of the import of arms,* ammunition and implements of war, including technical data relating thereto, *continue in effect and be administered by the Secretary of the Treasury* until revoked or superceded by him. All pending applications for import licenses not acted upon by the Secretary of State at the date of this order shall be transferred to the Secretary of the Treasury for appropriate action. (Emphasis added).

Servotech claims this executive order abrogated all export and import regulations, but immediately renewed only *import* regulations as indicated by the emphasized

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defense articles and defense services for the purposes of this section and to promulgate regulations for the import and export of such articles and services. The items so designated shall constitute the United States Munitions List.
22 U.S.C. § 2778(a)(1).

language above. Servotech asserts that subsequent to Executive Order 11432 all export regulations vanished. Thus, Servotech reasons that at the time the weapons were seized the regulations embodied in 22 C.F.R. articles 121-127 were either promulgated without authority or pertained only to the *import* of arms and did not proscribe the export activity in question.

[7] This interpretation is implausible. Executive Order 11432 abrogated neither import nor export laws. It merely transferred the administration of import regulations from the Secretary of State to the Secretary of the Treasury. Export regulations remained in effect, unaffected by Executive Order 11432 and therefore, fully operable to proscribe Servotech's attempt to export munitions to South Africa without a license.

III

The government cross appeals to contest the denial of forfeiture as to the Boeing 707. The jury found, based on a preponderance of the evidence, that (1) the owner, Fg, had not consented to or participated in the illegal attempt to export the weapons; and (2) the operator of the aircraft, Montana-Austria, did consent to and partipate in the illegal export attempt. In accord with this finding, the trial judge denied forfeiture and returned the aircraft to Fg.

The court ruled, as a matter of law, that the aircraft was a common carrier and, therefore, subject to the stsatutory common carrier exception to forfeiture under 19 U.S.C. § 1594. However, because the jury concluded that Montana-Austria, the operator of the aircraft, did consent to the illegal act, the statutory common carrier

exception could not be invoked to protect the plane from forfeiture. We agree.

The district court based denial of forfeiture on the due process exception to forfeiture suggested by the United States Supreme Court in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974). In *Calero-Toledo,* the Supreme Court permitted forfeiture of a leased pleasure yacht after police found marijuana aboard. The Supreme Court upheld the seizure and forfeiture as constitutional despite lack of prior notice or hearing and despite the fact that the lessor was neither involved in nor aware of the unlawfully use of the yacht. "Statutory forfeiture schemes are not rendered unconstitutional because of their application to the property interests of innocents." 416 U.S. at 680, 94 S.Ct. at 2090. Because the vessel is treated as the offender without regard to the owner's conduct, "the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense." *Id.* at 683, 684-86, 94 S.Ct. at 2092, 2093. The Supreme Court also noted, in dicta, that forfeiture may be "unduly oppressive" in circumstances where an owner "proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property." *Id.*, at 689-90, 94 S.Ct. 2094-95. The Supreme Court suggested that should an innocent property owner meet this standard, forfeiture could raise a due pocess question. *Id.* However, the owner in *Calero-Toledo* did not meet this exception because no allegation or proof was offered that the company did all that it reasonably could to avoid having its property put to unlawful use. *Id.* at 690, 94 S.Ct. at 2095.

This two-pronged test was applied by the district court to deny forfeiture of the 707. The first prong of the test, "uninvolved in and unaware of the wrongful activity," was decided by the jury in answering its special verdict. The correctness of this determination is not at issue. The second prong, requiring a property owner to do "all that reasonably could be expected to prevent the proscribed use of his property" was found by the district judge in response to Fg's Motion for Finding and Judgment. To reach its conclusion that "Fg did all that . . . reasonably could be expected of an aircraft leasing company to prevent illegal use of its aircraft," the district court made three underlying specific fact findings: (1) Fg had instructed Montana-Austria in the aircraft lease to not transport goods "whose transportation is prohibited by national or international provisions;"[18] (2) Fg had instructed Montana-Austria regarding the use of the aircraft; and (3) Fg had stationed an agent in Montana-Austria's office to supervise cargo shipments. From these findings the district court reached the factual conclusion that Fg had met the second prong of the test outlined by the Supreme Court in *Calero-Toledo*.

These underlying findings were based on the testimony of Fg's sole owner, Carl Press. The government does not dispute these findings, but rather, asserts that their cumulative effect fails to meet the standard laid out by the Supreme Court in the exception to the *Calero-Toledo* doctrine. We agree.

A party whose property has been seized has the burden of proof to show he has done all that reasonably could be expected to prevent the illegal use of his property.

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18. *See supra* note 5.

That burden cannot be defined in precise, universal terms. Its operative texture—reasonableness—depends on the facts of the particular situation to which it is applied. We can only observe that "reasonably" is woven into the stout fabric of "all that could be expected." The standard was intended to be high. However, it cannot be so strict that it fails to consider commercial realities that face those who transact business in the international marketplace.

Each of the district court's specific findings is supported by the record and therefore not clearly erroneous. However, the record reveals that these actions were taken in the normal course of Fg's business as leasor to Montana-Austria, prior to the occurrence of the events which led to seizure of the airplane. These findings do not relate to the actions Press took upon being alerted to possible illegal conduct by Montana-Austria.

The evidence concerning Montana-Austria's activities during the bulk of the lease period disclosed no reason to suspect it was involved in illegal activity. Press' periodic checks of Montana-Austria's operations disclosed no more than that the charter service routinely transported passengers, and on rare occasion cargo, to various parts of the world. The normalcy of these operations changed however, when Press was told by his delegate that Montana-Austria requested a stop off in Johannesburg on its way to the Sudan. Press testified that upon hearing this he was very upset, that he felt this change would be illegal without a flight plan and asked his delegate in Vienna to make certain there were proper documents and licenses for a flight from Houston to Johannesburg.[19]

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19. Press testified to the following at trial:
I had a phone call from Vienna, and my delegate in Vienna told me. And if I recall correctly, this was on a Friday or on a

[8, 9] Once Press was put on notice that Montana-Austria was about to engage in activity with his property that he thought would be illegal, his duty to do "all that reasonably could be expected" to prevent forfeiture increased. Strict forfeiture laws serve to prevent negligent entrustment of property. "To the extent that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property." *Calero-Toledo,* 416 U.S. at 467-68, 94 S.Ct. at 2094. Thus, when Press became aware that possible illegal activity was afoot, he should have known he could no longer rely on the course of action he had been taking prior to his awareness of any irregularity. Once his suspicions were aroused he had an affirmative duty to take more effective steps to protect his property from illegal use and subsequent forfeiture. Yet, the proof shows that he merely instructed his delegate to secure proper documentation.

Here, the plane was seized within forty-eight hours of Press' conversation with his delegate in Vienna. Acknowl-

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Saturday, meaning two days before the aircraft was seized in Houston, and he called me in regard to some other matters concerning my businesses, and at the end he mentioned just by chance, I think, said that Montana wanted to use the aircraft on a charter to Khartoum; said they had been asking if they could, while in flight to Khartoum, could change flight plans into Johannesburg, South Africa, and that really upset me. I said, "We don't do any of such things." If they know their destination, it's Johannesburg, since they have to fly a flight plan into Johannesburg and not take any detours, because I felt that this would be illegal. I further asked my delegate in Vienna to make sure that there would not be a charter signed or accepted without having proper documents, export licenses and whatever other official documents would be required to carry out that flight from Houston into Johannesburg.

edging that time and distance could have deterred personal involvement, this court need not require of Press that he contact regulatory authorities to determine whether proper flight plans were filed or the required end use certificates had been obtained. But we must reverse if we insist on no more than what Press himself acknowledged was necessary—a check on the documents required to fly from Houston to Johannesburg. Even using this minimum gauge, Press has failed to meet the standard. We find the record devoid of any proof that Press' agent checked with Montana-Austria or reported back to Press or that Press ever checked with his agent or anyone else to determine that his instructions had been executed.[20] The finding of the district court that Press did all that reasonably could be expected of an aircraft leasing company to prevent this illegal use of its aircraft is not supported by the record and is clearly erroneous.

The judgments appealed from are affirmed as to the forfeiture of the weapons seized and reversed and rendered as to the denial of forfeiture of the Boeing 707 aircraft. Costs of the appeals are assessed equally against Servotech International Establishment and One Boeing 707 aircraft.

AFFIRMED IN PART and, IN PART, REVERSED and RENDERED.

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20. To the contrary, Press testified as follows:

> After I had that telephone call on Friday or Saturday, I flew back to Germany. I was at that time in New York, and Monday morning I had a call from an Austrian newspaper asking me if I would have any comment or if I would want to say anything about the seizure of a Montana operated aircraft of the type 707. And I was very upset and angry, and I told him I have no knowledge of this. . . .
>
> Next thing, I called our delegate in Vienna and asked him about it. And he was also not aware of this incident, and he said, "I also have to check. . . ."

APPENDIX B

EXECUTIVE ORDERS

No. 10973

November 7, 1961, 26 F.R. 10469

ADMINISTRATION OF FOREIGN ASSISTANCE AND RELATED FUNCTIONS

By virtue of the authority vested in me by the Foreign Assistance Act of 1961 (75 Stat. 424) and section 301 of title 3 of the United States Code, and as President of the United States, it is hereby ordered as follows:

PART I. DEPARTMENT OF STATE

Section 101. Delegation of functions. Exclusive of the functions otherwise delegated, or reserved to the President, by the provisions of this order, and subject to the provisions of this order, there are hereby delegated to the Secretary of State (hereafter in this Part referred to as the Secretary) all functions conferred upon the President by . . . (4) the unrepealed provisions of the Mutual Security Act of 1954 (68 Stat. 832; 22 U.S.C. 1750 et seq.), and . . .

* * *

Sec. 105. Munitions control. In carrying out the functions conferred upon the President by section 414 of the Mutual Security Act of 1954, the Secretary shall consult with appropriate agencies. Designations, including changes in designations, by the Secretary of articles which shall be considered as arms, ammunition, and implements of war, including technical data relating

thereto, under that section shall have the concurrence of the Secretary of Defense.

* * *

PART III. OTHER AGENCIES

Sec. 301. Department of the Treasury. There is hereby delegated to the Secretary of the Treasury the function conferred upon the President by the second sentence of section 612 of the Act.

* * *

PART IV. RESERVED FUNCTIONS

Sec. 401. Reservation of functions to the President. There are hereby excluded from the functions delegated by the foregoing provisions of this order:

* * *

(b) The functions conferred upon the President by the Act and section 408(b) of the Mutual Security Act of 1954 with respect to the appointment of officers required to be appointed by and with the advice and consent of the Senate and with respect to the appointment of officers pursuant to section 624(c) of the Act and the function so conferred by section 204 of the Act of assigning officers to the Development Loan Committee.

* * *

(f) That under section 523(d) of the Mutual Security Act of 1954.

* * *

Sec. 604. References to orders and Acts. Except as may for any reason be inappropriate:

(a) References in this order or in any other Executive order to (1) the Foreign Assistance Act of 1961 (including references herein to "the Act"), (2) unrepealed provisions of the Mutual Security Act of 1954, (3) any other act which relates to the subject of this order, or (4) any provisions of any thereof shall be deemed to include references thereto, respectively, as amended from time to time.

* * *

(d) References in this order or in any other Executive order to this order or to any provision thereof shall be deemed to include references thereto, respectively, as amended from time to time.

* * *

Sec. 606. Saving provisions. Except to the extent that they may be inconsistent with this order, all determinations, authorizations, regulations, rulings, certificates, orders, directives, contracts, agreements, and other actions made, issued, or entered into with respect to any function affected by this order and not revoked, superseded, or otherwise made inapplicable before the date of this order, shall continue in full force and effect until amended, modified, or terminated by appropriate authority.

* * *

JOHN F. KENNEDY

THE WHITE HOUSE

November 3, 1961.

APPENDIX C

EXECUTIVE ORDERS

No. 11432

October 24, 1968, 33 F.R. 15791

CONTROL OF ARMS IMPORTS

By virtue of the authority vested in me by Section 414 of the Mutual Security Act of 1954, as amended (22 U.S.C. 1934),[61] and Section 301 of Title 3 of the United States Code,[62] and as President of the United States, it is ordered as follows:

Section 1. Section 301 of Executive Order No. 10973 of November 3, 1961,[63] is hereby amended to read as follows:

"Sec. 301. Department of the Treasury. There are hereby delegated to the Secretary of the Treasury:

"(a) The function conferred upon the President by the second sentence of Section 612 of the Act.

"(b) So much of the functions conferred upon the President by Section 414 of the Mutual Security Act of 1954, as amended, as relate to control of the import of arms, ammunition and implements of war, including technical data relating thereto. In carrying out such functions the Secretary of the Treasury shall consult with appropriate agencies, and on matters affecting world peace, the

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61. 22 U.S.C.A. § 1934.

62. 3 U.S.C.A. § 301.

63. 22 U.S.C.A. § 2381 note.

external security and foreign policy of the United States he shall be guided by the views of the Secretary of State. Designations, including changes in designations, or articles subject to import control under Section 414 shall have the concurrence of the Secretary of State and the Secretary of Defense."

Sec. 2. All regulations issued and presently in effect pursuant to Section 414 of the Mutual Security Act of 1954, as amended, shall, insofar as they relate to control of the import of arms, ammunition and implements of war, including technical data relating thereto, continue in effect and be administered by the Secretary of the Treasury until revoked or superseded by him. All pending applications for import licenses not acted upon by the Secretary of State at the date of this order shall be transferred to the Secretary of the Treasury for appropriate action.

LYNDON B. JOHNSON

THE WHITE HOUSE

October 22, 1968.

APPENDIX D

EXECUTIVE ORDERS

No. 11959

Jan. 18, 1977, 42 F.R. 4315

ADMINISTRATION OF FOREIGN ASSISTANCE AND RELATED FUNCTIONS

By virtue of the authority vested in me by the Constitution and statutes of the United States of America, including Section 621 of the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2381), and Section 301 of Title 3 of the United States Code, and as President of the United States of America, Executive Order No. 10973, as amended, is hereby further amended as follows:

* * *

Sec. 2. Section 105 is revoked and the following new section is substituted therefor:

"Sec. 105. Allocation of Foreign Assistance. In carrying out the functions conferred upon the President by section 653 of the Act, the Secretary of State shall consult with the Director of the Office of Management and Budget.".

* * *

Sec. 6. Section 301 is amended to read as follows:

"Sec. 301. Department of the Treasury. There are delegated to the Secretary of the Treasury the functions conferred upon the President by the third sentence of section 102(d) as it relates to international development

organizations in which the United States is represented by the Secretary of the Treasury, section 301(e)(3) as it relates to organizations referred to in section 301(e)(2), the second sentence of section 612(a), section 634(f), and section 634(g) of the Act. The Secretary of the Treasury shall continue to administer any open special foreign country accounts established pursuant to former section 514 of the Act as enacted by section 201(f) of Public Law 92-226 (86 Stat. 25) and repealed by Section 12(b)(5) of Public Law 93-189 (87 Stat. 722).".

* * *

GERALD R. FORD

THE WHITE HOUSE

January 18, 1977.

APPENDIX E

PRESIDENTIAL DOCUMENTS

Executive Order 12444 of October 14, 1983

Continuation of Export Control Regulations

By the authority vested in me as President by the Constitution and laws of the United States of America, including section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702) (hereinafter referred to as "the Act), and 22 U.S.C. 287c,

I, RONALD REAGAN, President of the United States of America, find that the unrestricted access of foreign parties to United States commercial goods, technology, and technical data and the existence of certain boycott practices of foreign nations constitute, in light of the expiration of the Export Administration Act of 1979, an unusual and extraordinary threat to the national security, foreign policy and economy of the United States and hereby declare a national economic emergency to deal with that threat.

Accordingly, in order (a) to exercise the necessary vigilance over exports from the standpoint of their significance to the national security of the United States; (b) to further significantly the foreign policy of the United States, including its policy with respect to cooperation by United States persons with certain foreign boycott activities, and to fulfill its international responsibilities; and (c) to protect the domestic economy from the excessive drain of scarce materials and reduce the serious

economic impact of foreign demand, it is hereby ordered as follows:

* * *

Section 3. Provisions for the administration of section 38(e) of the Arms Export Control Act (22 U.S.C. 2778 (e)) may be made and shall continue in full force and effect until amended or revoked under the authority of section 203 of the Act (50 U.S.C. 1702). To the extent permitted by law, this Order also shall constitute authority for the issuance and continuation in full force and effect of rules and regulations by the President or his delegate, and all orders, licenses, and other forms of administrative action issued, taken or continued in effect pursuant thereto, relating to the administration of section 38(e).

* * *

RONALD REAGAN

THE WHITE HOUSE

October 14, 1983.

APPENDIX F

EXECUTIVE ORDERS

No. 12451

Executive Order 12451 of December 20, 1983

Continuation of Export Control Regulations

48 F.R. 56563

By the authority vested in me as President by the Constitution and laws of the United States of America, including section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702) (hereinafter referred to as "IEEPA"), 22 U.S.C. 287c, and the Export Administration Act of 1979, as amended (50 U.S.C. App. 2401 *et seq.*) (hereinafter referred to as "the Act), it is hereby ordered as follows:

Section 1. In view of the extension by Public Law 98-207 (December 5, 1983), of the authorities contained in the Act, Executive Order No. 12444[29] of October 14, 1983, which continued in effect export control regulations under IEEPA is revoked, and the declaration of economic emergency is rescinded.

Sec. 2. The revocation of Executive Order No. 12444[29] shall not affect any violation of any rules, regulations, orders, licenses and other forms of administrative action under that Order which occurred during the period that Order was in effect. . . .

* * *

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29. 1983 U.S. Code Cong. & Adm. News Pamphlet No. 8, page B80.

Sec. 3. All orders, licenses, and other forms of administrative action issued, taken or continued in effect pursuant to the authority of the IEEPA and Executive Order No. 12444[29] relating to the administration of section 38 (e) of the Arms Export Control Act (22 U.S.C. 2778 (e)) shall remain in full force and effect until amended or revoked under proper authority.

Sec. 4. This Order shall take effect immediately.

RONALD REAGAN

THE WHITE HOUSE

December 20, 1983.

APPENDIX G

EXECUTIVE ORDERS

No. 12470

Executive Order 12470 of March 30, 1984

Continuation of Export Control Regulations

49 F.R. 13099

By the authority vested in me as President by the Constitution and laws of the United States of America, including section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702) (hereinafter referred to as "the Act"), and 22 U.S.C. 287c,

I, RONALD REAGAN, President of the United States of America, find that the unrestricted access of foreign parties to United States commercial goods, technology, and technical data and the existence of certain boycott practices of foreign nations constitute, in light of the expiration of the Export Administration Act of 1979, an unusual and extraordinary threat to the national security, foreign policy and economy of the United States and hereby declare a national economic emergency to deal with that threat.

Accordingly, in order (a) to exercise the necessary vigilance over exports from the standpoint of their significance to the national security of the United States; (b) to further significantly the foreign policy of the United States, including its policy with respect to cooperation by United States persons with certain foreign boycott activities, and to fulfill its international responsibilities;

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and (c) to protect the domestic economy from the excessive drain of scarce materials and reduce the serious economic impact of foreign demand, it is hereby ordered as follows:

* * *

Sec. 3. Provisions for the administration of section 38(e) of the Arms Export Control Act (22 U.S.C. 2778(e)) may be made and shall continue in full force and effect until amended or revoked under the authority of section 203 of the Act (50 U.S.C. 1702). To the extent permitted by law, this Order also shall constitute authority for the issuance and continuation in full force and effect of all rules and regulations by the President or his delegate, and all orders, licenses, and other forms of administrative action issued, taken or continued in effect pursuant thereto, relating to the administration of section 38(e).

* * *

RONALD REAGAN

THE WHITE HOUSE

March 30, 1984.

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APPENDIX H

PRESIDENTIAL DOCUMENTS

Presidential Determination No. 85-4 of February 4, 1985

Eligibility of Malawi To Make Purchases of Defense Articles and Defense Services Under the Arms Export Control Act

Memorandum for the Honorable George P. Shultz, the Secretary of State

Pursuant to the authority vested in me by Section 3(a)(1) of the Arms Export Control Act, I hereby find that the furnishing of defense articles and defense services to the Government of Malawi will strengthen the security of the United States and promote world peace.

You are directed on my behalf to report this finding to the Congress.

This finding shall be published in the *Federal Register*.

RONALD REAGAN

THE WHITE HOUSE

Washington, February 4, 1985.

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